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Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 332.

THE COCA-COLA COMPANY, *Petitioner*,

v.

SNOW CREST BEVERAGES, INC., *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING PETITION FOR CERTIORARI.

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Subject Index.

	Page
Opinions below	1
Jurisdiction	1
Statement of the case	2
The issues presented by the petition	2
The findings and the facts	2
Argument	6
I. There is no conflict with the cases in other Circuits	6
II. No novel question or issue of importance is presented	9
III. No basis for reversal exists	10
Conclusion	11

Table of Authorities Cited.

CASES.

Ansco Photoproducts, Inc., v. Eastman Kodak Co., 19 F. (2d) 720	9*n*.
California Cyanide Co. v. American Cyanamid Co., 40 F. (2d) 1013	9*n*.
Cleo Syrup Corp. v. Coca-Cola Co., 139 F. (2d) 416; cert. den. 321 U.S. 781	8
Coca-Cola Co. v. Belinsky, 57 F. Supp. 120	8
Coca-Cola Co. v. Carlisle Bottling Works, 43 F. (2d) 119	9
Coca-Cola Co. v. Chero-Cola Co., 273 Fed. 755	8*n*.
Coca-Cola Co. v. Dixi-Cola &c., 31 F. Supp. 835	7
Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720	8*n*.
Coca-Cola Co. v. Nehi Corp., 36 Atl. (2d) 156	6, 9*n*.
Coca-Cola Co. v. Old Dominion Bev. Corp., 271 Fed. 600	8*n*.
Coca-Cola Co. of Canada, Ltd., v. Pepsi-Cola Co. of Canada, Ltd. (British Privy Council), All Eng. Rep. 1942, vol. I, p. 615; 32 T.M. Rep. 313	6, 8*n*.

Page

Dixi-Cola Laboratories, Inc., v. Coca-Cola Co., 117 F. (2d) 352 6, 7, 11
Goodall Worsted Co. v. Palm Knitting Co., 10 F. (2d) 1013 9*n*.
My-T Fine Corp. v. Samuels, 69 F. (2d) 76 7
Parmele Pharmacal Co. v. Weiner, 5 F. (2d) 750 9*n*.
Purity Springs Water Co. v. Redwood Ice Delivery, 203 Cal. 286, 263 Pac. 810 9*n*.
Rytex Co. v. Ryan, 126 F. (2d) 952 9*n*.
Thomas Kerfoot & Co., Ltd., v. Louis K. Liggett Co., 67 F. (2d) 214 6
Valvoline Oil Co. v. Havoline Oil Co., 211 Fed. 189 9*n*.
Warner & Co. v. Lilly & Co., 265 U.S. 526 10
Yeasties Products v. General Mills, 77 F. (2d) 523 9*n*.
Younghusband v. Kurlash Co., 94 F. (2d) 230 9*n*.

STATUTES.

Act of July 5, 1946 (15 U.S.C. Sec. 1122) 1
Judicial Code as amended by Act of Feb. 13, 1925, Sec. 240 (a) (28 U.S.C. sec. 347 (a)) 1
15 U.S.C. Sec. 97 1

Rules of Civil Procedure, Rule 52 (a) 7

Supreme Court of the United States.

October Term, 1947.

No. 332.

THE COCA-COLA COMPANY, Petitioner,
v.
SNOW CREST BEVERAGES, INC., Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court appears on pages 13 to 32 of the Record and is reported in 64 Fed. Supp. 980. The opinion of the Circuit Court of Appeals appears on pages 494 to 504 of the Record and is reported in 162 F. (2d) 280.

JURISDICTION.

Federal jurisdiction rests upon 15 U.S.C. Sec. 97, and upon diversity of citizenship and amount in controversy. Jurisdiction of this court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. Sec. 347 (a)), and on Act of July 5, 1946 (15 U.S.C. Sec. 1122).

STATEMENT OF THE CASE.

The Issues Presented by the Petition.

The petitioner sought to enjoin the use of Polar Cola because, as claimed, it had been used as an instrument of unfair competition and it is so like Coca-Cola as to infringe that registered mark.

The District Court found that there had been no unfair competition and that the mark does not infringe Coca-Cola, and accordingly dismissed the complaint. The Circuit Court of Appeals affirmed.

Certiorari is sought on the grounds that Polar Cola is in fact a colorable imitation, and that the contrary holding is in conflict with cases in other Circuits dealing with other marks.

Respondent submits that the petition should be denied for that there is no conflict with other cases, no novel point or issue of importance is presented and no basis for a reversal exists.

The Findings and the Facts.

The respondent's soft-drink bottling business is in two aspects: the one, sales to retail stores for resale in the unopened labelled package (R. 321, Q. 133; R. 322, Q. 151) and the other, sales to bars, taverns, hotels and the like, for use as a bar cola (R. 14, Fdg. 5). The District Court found no likelihood of confusion in the important retail store business, and that "even a purchaser of a Polar Cola bottle who was not alert could not reasonably assume that defendant's bottled goods came from the plaintiff" (R. 20, Fdg. 22). No contention to the contrary is made (R. 38, 290, Q. 35).

The bulk of the evidence to support the claim of infringement and unfair competition came from petitioner's

investigators, who gave orders in bars, taverns and restaurants in Boston.

The petitioner's contention was that this evidence showed confusion due to phonetic similarity, and that respondent's name, labelling and label changes showed unfair competition in this business.

Petitioner has relied substantially only on the alleged phonetic similarity (C.C.A. Op., R. 500) and now asserts that the test of infringement is "wholly phonetic" (Brief, p. 14).

1. Actually none of the evidence showed confusion due to phonetic similarity. The evidence did show clearly that the substitution which occurred was not due to confusion or phonetic or other likeness.

Petitioner's investigators went into 82 bars, taverns and the like in Boston. They found that when they ordered a mixed drink such as "whiskey and Coca-Cola" substitutions were made of any one of various bar colas, including Polar Cola (R. 23, Fdg. 30). These bar colas were up to 13 in number (R. 22, Fdg. 26). Polar Cola was used in 47 bars, other drinks in 35 bars.[1]

The experience in the 35 non-Polar Cola serving bars completely negatived any inference that the substitution was made because of phonetic similarity. Out of 200 orders in non-Polar Cola serving bars, Royal Crown was served 31 times, Castle Rock Beverages 28 times, Pepsi Cola 25 times, Coca-Cola 33 times, Walker's Beverages 9 times, Lime Cola 5 times, LaSalle Beverages 2 times, Epi-

[1] The investigators made repeat visits only to bars where Polar Cola was substituted (R. 303, X-Q. 116). The greater total of reported substitutions in the Polar Cola serving bars means only that there were many repeat visits to those bars. It does not signify any greater substitution in fact of Polar Cola for Coca-Cola than of the other named colas used in the bar trade in Boston, some of which have been litigated and found not to infringe and others of which bear no phonetic similarity whatsoever.

cure Club 2 times, Unidentified 66 times (R. 294, Q. 58; C.C.A. Op., R. 501; Dist. Ct. Op., R. 23, Fdg. 30).

There was evidence that there are many orders for mixed drinks in which a specific cola is not called for and apparently these are much the greater in number and the specific orders relatively few (R. 24, Fdg. 33 (b), R. 352).

The inescapable conclusion was that (in the words of the District Court), "When the bartender wanted to make a substitution, he could and did make it equally with any type of inexpensive cola drink, no matter how named or packaged" (R. 25, Fdg. 33 (f)).[2] The specific orders were fringe orders in a large open cola field.

The fact that, in a few instances, waiters, caught in a substitution agreed, by acquiescing in leading questions of the investigators, that the names sounded alike, was held to be without significance by both courts (R. 502; R. 32, Fdg. 38 (e)).

2. There was nothing in the evidence as to the name or the labelling which warranted or required a finding of unfair competition.

The petitioner now virtually accepts the unequivocal findings of both courts to this effect (R. 25, Fdg. 33 (f); R. 499) so far as concerns an intent of "directly confusing the public," but suggests that the alleged simulation was in order to make *dealers think* of substituting (Brief, p. 14).

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[2] There was the further fact that in 31 and possibly 32 cases out of 33, when Coca-Cola alone was ordered—that is, without a strong drink with it—either Coca-Cola was served or an explanation given (or, in two cases, Royal Crown was served) (R. 135, 139, 141-142, 149, 189-190, 227-228, 261, 263, 270). Clearly waiters were not misunderstanding in any of the cases in which Coca-Cola was ordered. In *all* the mixed drink cases they were using a bar cola, whatever it was, and quite regardless of similarity of name.

There is no evidence whatever to support this novel contention.

The court found that respondent never suggested substitution (C.C.A. Op., R. 501) and that all that it did was to manufacture a like drink and sell it for less (C.C.A. Op., R. 502), "which it certainly was within its rights in doing" (*Idem*). Neither did the respondent fail to act in any respect in which action was required (R. 27-30, 504).

The name Polar had been used by respondent for soft drinks since 1929. The label changes and the descriptive adjectives spoken of were affirmatively shown to be not related to Coca-Cola or to thought of simulation.[3]

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[3] In view of the repeated assertions of the petition that there was colorable imitation and "step by step" approach, the relevant facts are here briefly summarized:

Respondent had used the name Polar for soft drinks steadily since 1929 (R. 15, Fdg. 7). It first produced a cola in 1935, trying it first in its higher priced fresh fruit Snow Crest line as Sno-Kola, and then in both this line and its lower priced Polar Cub line. The lower priced line of carbonated beverages other than cola had a greater volume of sales than the fresh fruit line and the respondent found that the trade demanded the lower priced cola package. The Sno-Cola line brought in little business and was given up and the respondent has continued the Polar Cola sales (R. 15, Fdgs. 8, 9; R. 320, Qs. 119, 123, 127-128; R. 476, 357).

Respondent's earlier labels had a bear and arctic scene (R. 16, Fdg. 10). Later (1943) a label was used having a red background and the name in large white letters approaching script with a prominent picture of an owl and the slogan: "Get wise. Giant size." The name of the respondent as bottler also appeared (R. 16, Fdg. 11). At the time of the change respondent had had a notice from Great Bear Spring Company (R. 392, Q. 640) on the basis of which counsel advised that it could not hope to expand with the then label (Bear Cub) outside its then operated territory (R. 392, Q. 643). That was an element in the change to the new label (R. 392, Q. 644).

Petitioner speaks of the words "delicious" and "refreshing" as though used with other features and to suggest substitution (Brief, p. 2). Actually these words were used in the early period only (R. 16, Fdg. 10; Petr's. Brief, p. 9, statement 6) and only on the totally different bear labels (R. 16, Fdgs. 10 and 11).

ARGUMENT.

I.

There is No Conflict with the Cases in Other Circuits.

1. It has recently been established that the word cola is generic and may be used by anyone as a part of a trade mark.

Dixi-Cola Laboratories, Inc., v. *Coca-Cola Co.*, 117 F. (2d) 352 (C.C.A. 4th, 1941).

Coca-Cola Company of Canada, Ltd., v. *Pepsi-Cola Company of Canada, Ltd.* (British Privy Council), All Eng. Rep. 1942, vol. I, p. 615; 32 T.M. Rep. 313.

Coca-Cola Co. v. *Nehi Corp.*, 36 Atl. (2d) 156 (Del. 1944).

Cases prior to these, in which cola marks are enjoined, are subject to discount because of the claims made in them of the right to the "cola" part of the name.

2. Now that cola is generic and freely usable there is a materially different frame of reference for infringement cases in the cola field.

The applicable principle is stated in the Vapure-Vapex case.

Thomas Kerfoot & Co., Ltd., v. *Louis K. Liggett Co.*, 67 F. (2d) 214, 215 (C.C.A. 1st, 1933):

> "The question whether 'Vapure' is an infringement on 'Vapex', i.e., whether the two names are so similar in appearance and in sound that one is likely to be mistaken for the other by an ordinarily careful buyer, is to be determined, not merely by an inspection of the words, but by considering them in connection with other similar words in use in the same general field.

> . . . With so many trade-marks having the same basic syllable (Vap) already in use at the time of the plaintiff's registration in this country, it must be supposed that the public discriminated between them by the ending or combination in which 'Vap' was used."

3. The cases following the cola decisions are clearly distinguishable.

They all turn on the District Court's findings (Rules of Civil Procedure, Rule 52 (a)) and they are all cases in which findings of infringement have been sustained. None of them turns on phonetic equivalence. They are all cases in which acts of intentional unfair competition were found. Thus they each had the affirmative expert evidence of the wrongdoer, through his act of adopting the name with intent to copy, that the names were similar (*My-T Fine Corporation* v. *Samuels*, 69 F. (2d) 76, 77 (C.C.A. 2d, 1934)).

4. There is no conflict with the Apola Cola case (Petr's. Brief, p. 16) (*Dixi-Cola Laboratories, Inc.* v. *Coca-Cola Co.*, 117 F. (2d) 352 (C.C.A. 4th, 1941); *Coca-Cola Co.* v. *Dixi-Cola &c.*, 31 F. Supp. 835 (D.C. D. Md. 1940)). The decree in that case was virtually a consent decree as to this name. The opinion of the District Court says (p. 837): "However, at the trial, counsel for defendants abandoned any right to continue to use the name 'Apola Cola,' and there is little if any evidence respecting the use of the name 'Lola-Kola' or 'May-Cola'. . . ." The Circuit Court of Appeals (p. 353) stated that no defense was made as to Apola Cola and Lola-Kola. There is no discussion of phonetic likeness of these words to Coca-Cola.

Further, in that case there was found to be unfair competition, intent to pass off, and a conspiracy between defendants and their customers to palm off goods (117 F. (2d) 352, 360).

5. There is no conflict with the Pola Cola case (*Coca-Cola Co.* v. *Belinsky,* 57 F. Supp. 120). This case did not go beyond the District Court. The evidence showed that from the beginning the defendant intended to palm off his product. He was a former Coca-Cola employee acting with deliberate intention of deceit in adopting both color and name (p. 121). There is no discussion of phonetic likeness.

6. There is no conflict with the Cleo Cola case (*Cleo Syrup Corp.* v. *Coca-Cola Co.,* 139 F. (2d) 416; cert. den. 321 U.S. 781). Here again deliberate intent was found (p. 419). The court said: ". . . the deceptive similarity was deliberately brought about by the defendant." The court noted that the trial court's findings must prevail if not clearly wrong (417).

It does not follow, because Cleo or the other names (*supra*) in their context of overall appearance and use were infringing, that Polar in its context *must* be found to infringe.

7. The other cases referred to by the petitioner are pre-Dixi-Cola cases (Petr's. Brief, p. 18) and on any aspect are clearly distinguishable.[4]

8. In another post-Dixi-Cola case there was a two syllable first name and the use of "o" and "a" in that word, but no infringement was found.[5]

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[4] Fletcher's Coca Cola is obviously enjoinable. In the Taka Cola case the court said it was deciding only that case and noted that it had found unfair competition (271 Fed. 600, 604 (C.C.A. 4th, 1921)). The Chero Cola case (273 Fed. 755 (C.C.A. D.C. 1921)) was an application to register a trade mark and many witnesses testified to actual confusion. In the Gay-Ola case (200 Fed. 720 (C.C.A. 6th, 1912)) there was blatant offering of the product for substitution, and cheating.

[5] Noteworthy also are the Pepsi Cola and Royal Crown cases.

Coca-Cola Company of Canada, Ltd., v. *Pepsi-Cola Co. of Canada, Ltd.* (British Privy Council), All Eng. Rep. 1942, vol. I,

Coca-Cola Co. v. *Carlisle Bottling Works*, 43 F. (2d) 119 (C.C.A. 6th, 130) (Roxa Cola held not to infringe. Plaintiff's acquiescence found).

9. There are numerous non-cola cases in which no infringement has been found, although the names are more similar than Polar Cola is to Coca Cola.[6]

II.

No Novel Question or Issue of Importance is Presented.

It is submitted that this is apparent on the facts and the cases.

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p. 615; 32 T.M. Rep. 313 (Pepsi Cola). The use of script in the name, red color in advertising, and like color and taste was emphasized but no infringement was found.

Coca-Cola Co. v. *Nehi Corporation* (Del. 1944) 36 Atl. (2d) 156, 165 (Royal Crown). Here the court found no objection even though aroma, taste and color were the same, and the words "delicious" and "refreshing" had been used.

[6] E.g.: *Goodall Worsted Co.* v. *Palm Knitting Co.*, 10 F. (2d) 1013 (App. D.C.) (Palm-Knit—Palm Beach). *Valvoline Oil Co.* v. *Havoline Oil Co.*, 211 Fed. 189 (Valvoline—Havoline). *California Cyanide Co.* v. *American Cyanamid Co.*, 40 F. (2d) 1013 (C.C.P.A.) (Citrofume—Citrus Dust). *Rytex Co.* v. *Ryan*, 126 F. (2d) 952 (C.C.A. 7) (Rytex—Rynart). *Parmele Pharmacal Co.* v. *Weiner*, 5 F. (2d) 750, 751 (C.C.A. 2) (Asepticons—Quinsepticons). *Purity Springs Water Co.* v. *Redwood Ice Delivery*, 203 Cal. 286, 263 Pac. 810 (Purity Spring Water—Puritan Water). *Yeasties Products* v. *General Mills*, 77 F. (2d) 523 (C.C.P.A.) (Yeasties—Wheaties). *Ansco Photoproducts, Inc.* v. *Eastman Kodak Co.*, 19 F. (2d) 720 (App. D.C.) (Speedex—Speedway). *Younghusband* v. *Kuriash Co.*, 94 F. (2d) 230 (C.C.P.A.) (Starlash—Kurlash).

III.

No Basis for Reversal Exists.

The issue is one of fact on exhibits and oral testimony.

Warner & Co. v. *Lilly & Co.*, 265 U.S. 526, 529.

The names are in fact different and context of use was material.

The failure to adduce any persuasive evidence of confusion based on likeness between the names was important and the court was entitled to give it weight.

Polar Cola apart from context of use and as a matter of law does not infringe Coca-Cola. The names are in fact *materially* different. The hard "c"'s of Coca-Cola are forceful and incisive. It is very unlikely, as the District Court pointed out, that when the word containing them (Coca-Cola) is pronounced anyone would think that "Polar Cola" was said (R. 32, Fdg. 38 (e)).[7]

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[7] The court said that it was possible that when a consumer orally ordered Polar Cola a bartender or waiter "might understand the order to be Coca-Cola." This is not, as the petitioner claims (Brief, p. 15), a conclusion which would require the finding that, if Polar Cola were first in the field, Coca-Cola would be a colorable imitation of it. The court was speaking of an order which was unlikely to be made, since on the evidence Polar Cola was little advertised and no consumer demand had been created (R. 22, Fdg. 27), and of an order given in a market in which, on the evidence, the likelihood of the customer saying "Coca-Cola" was substantial. There is in this situation a possibility that any compound cola name, the first part of which is composed of two syllables, coming into the field in which Coca-Cola is so emphatically dominant, both in advertising and sales, will be subject to the disability that the waiter may understand "the *order* to be Coca-Cola." (Emphasis added.) The court did not list or need to list the several reasons for this other than possible phonetic similarity, such as that the waiter might not hear or give attention to the first syllable and hence assume that the order was, as usual, "Coca-Cola."

All the three consonants of Polar are unlike those in Coca.

The names are different in connotation as well as in sound. Quite apparently Polar was adopted to suggest a very cold beverage, while Coca on the other hand was adopted to suggest a drink made from the leaves of the coca plant (*Dixi-Cola Laboratories, Inc.*, v. *Coca-Cola Co.*, 117 F. (2d) 352, 355 (C.C.A. 4th, 1941)).

CONCLUSION.

It is respectfully submitted that the petition should be denied.

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The court's adversion to this *possibility* (not a finding) is no basis for asserting that Polar Cola is a colorful imitation of Coca-Cola.